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18-P-1570 Appeals Court

WHITECAP INTERNATIONAL SEAFOOD EXPORTERS, INC. vs. EASTERN INSURANCE GROUP, LLC.

No. 18-P-1570.

Plymouth. November 12, 2019. - June 5, 2020.

Present: Rubin, Wolohojian, & Henry, JJ.

Food. Contract, Insurance, Insurance agency. Insurance, "All risk" policy, Liability insurance, Coverage, Perils clause.

Civil action commenced in the Superior Court Department on October 8, 2014.

The case was heard by Susan E. Sullivan, J., on a motion for summary judgment.

Brian P. Voke for the plaintiff.
William P. Rose for the defendant.

WOLOHOJIAN, J. This case arises out of the failure of the defendant, Eastern Insurance Group, LLC (Eastern Insurance), to obtain warehouse legal liability insurance for a group of companies that operated cold storage warehouses. The issue on appeal is whether a warehouse legal liability insurance policy,

had one been obtained, would have covered temperature fluctuation damage (also known as spoilage) to a large amount of frozen snow crab that occurred when the crab was removed from the freezer in one of the warehouses following a forklift accident. Because we conclude that there are genuine issues of material fact as to whether a coverage extension in the warehouse legal liability insurance policy that Eastern Insurance could have obtained for the plaintiff, Whitecap International Seafood Exporters, Inc. (Whitecap), would have provided liability coverage in the circumstances of this case, we vacate the summary judgment in Eastern Insurance's favor and remand for further proceedings.

Background. We summarize the evidence in the light most favorable to Whitecap as the nonmoving party. See Godfrey v. Globe Newspaper Co., 457 Mass. 113, 119 (2010). Thomas Parenteau was the president of four companies (collectively, the Cold Storage Solutions entities) that operated cold storage warehouses on Kenneth Welch Drive in Lakeville. In the summer of 2011, Parenteau hired Eastern Insurance to obtain warehouse legal liability insurance for all of the Cold Storage Solutions entities. Although Eastern Insurance subsequently informed Parenteau that it had obtained the requested coverage, this was true only with respect to some of the Cold Storage Solutions entities; Eastern Insurance failed to obtain warehouse legal

liability insurance for Cold Storage Solutions III, Inc. (CSS III), which operated the cold storage warehouse at 234 Kenneth Welch Drive (the warehouse).

On October 9, 2011, a forklift operator drove a mechanized forklift into the racking system in the freezer of the warehouse, causing fifty to sixty-five freezer racks and millions of pounds of frozen food to collapse. Parenteau submitted an affidavit stating that "[t]he destruction . . . looked like a massive bomb had gone off in the freezer," that workers had to be "suspended by ropes from the ceiling of the freezer in order to move frozen food . . . out of the freezer," and that "it became virtually impossible for customers like Whitecap . . . to sell their product to third parties because [of] the inaccessibility of most of the product." Parenteau further attested that "there was . . . a danger of additional racks collapsing within the freezer from the forklift accident."

Whitecap had been storing snow crab in the warehouse at the time of the forklift accident, and some of that crab was broken in the collapse. Whitecap had to sort through the broken product to determine which portions could be sold at a discounted price and which had to be destroyed. This case does not concern Whitecap's broken crab, none of which suffered temperature fluctuation damage; instead, it concerns the remainder of Whitecap's crab, which was moved from the warehouse

because of the risk that additional freezer racks would collapse. This unbroken product suffered temperature fluctuation damage when it was being moved from the warehouse, and it is this unbroken product for which we must determine whether CSS III's liability would have been covered under a warehouse legal liability insurance policy had one been obtained by Eastern Insurance.

Government regulations require that all frozen food be traceable by lot. Before moving any of Whitecap's crab out of the warehouse, it therefore had to be inventoried. Due to the damage to the warehouse, CSS III staged this inventory in a loading area of the warehouse adjacent to the freezer. As attested to by Parenteau, "In an attempt to use the refrigeration equipment within the warehouse to keep Whitecap's [crab] from thawing during the evacuation process . . . [t]he doors to the freezer [were] left open to allow the refrigeration equipment to generate cold air which would flow into the staging area." The same process was used to inventory both Whitecap's broken and unbroken crab, with one critical exception. Whitecap's director of quality control, Brian Cuff, oversaw the inventorying of the broken crab, and he testified in his deposition that he arranged for this broken product to remain in the loading area for only twenty to thirty minutes at a time. CSS III's employees, however, oversaw the inventorying of

Whitecap's unbroken crab, and this unbroken product was allowed to remain outside the freezer in the loading area for five to six hours at a time.

After Whitecap began to receive complaints regarding its frozen crab, it traced the affected lots and discovered they shared the common feature of having been stored too long in the loading area outside the freezer, thus suffering temperature fluctuation damage. Litigation ensued and, ultimately, Whitecap entered into a settlement agreement in which, among other things, Parenteau and the Cold Storage Solutions entities assigned to Whitecap their claims against Eastern Insurance for its failure to obtain the insurance that Parenteau had requested.[1] Whitecap then asserted claims against Eastern Insurance for breach of fiduciary duty, breach of contract, professional negligence, negligent misrepresentation, gross negligence and bad faith, and violation of G. L. c. 93A.

Eastern Insurance moved for summary judgment, arguing that its failure to obtain the requested insurance did not cause any harm because the requested insurance would not have provided liability coverage for the temperature fluctuation damage to Whitecap's unbroken crab. The summary judgment record included,

[1] The settlement also included several insurers as subrogees of various Whitecap affiliated entities.

among other documents, a warehouse legal liability policy (the policy) that, as the matter is presented to us, is the only basis on which to determine the terms that would have applied had Eastern Insurance obtained the requested insurance. That policy is the one that was issued to a related Cold Storage Solutions entity that operated a warehouse at 220 Kenneth Welch Drive. In other words, in essence, Whitecap's position is that the warehouse where the forklift accident occurred (234 Kenneth Welch Drive) would have been covered under a policy with the same provisions as the policy Eastern Insurance obtained for a warehouse operated by the related Cold Storage Solutions entity down the road. A judge of the Superior Court reviewed the policy, agreed with Eastern Insurance that the policy would not have provided liability coverage in the circumstances of this case, and allowed summary judgment in Eastern Insurance's favor.[2]

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[2] Whitecap argues that its claims survive regardless of the terms of the policy, as there is a genuine issue of material fact as to whether CSS III's liability would have been covered under a different insurance policy available in the marketplace. Whitecap points to a statement in its expert's disclosure that "[t]here was insurance [in] the marketplace to cover the . . . losses had Eastern [Insurance] obtained the proper coverage." This single unsupported conclusion of fact is insufficient to raise a genuine issue of material fact. See, e.g., Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc., 416 Mass. 684, 696 (1993). There is nothing in the summary judgment record to show or suggest what the terms of any such hypothetical policy might be, let alone that those terms would have differed from the terms of the policy issued to the related Cold Storage Solutions entity operating the warehouse at 220 Kenneth Welch Drive. We note further that Whitecap's expert's coverage opinion is based

Discussion. As a general principle, "[a]n insured bears the initial burden of proving that the claimed loss falls within the coverage of the insurance policy. Once the insured does this, the burden then shifts to the insurer to show that a separate exclusion to coverage is applicable to the particular circumstances of the case. Finally, where the insured seeks to establish coverage through an exception contained within an exclusion to coverage, the burden shifts back to the insured to prove coverage for the claimed loss" (citations omitted). Boazova v. Safety Ins. Co., 462 Mass. 346, 351 (2012). An insurer that moves for summary judgment, however, also bears the burden of showing that the insured would be unable to meet its burden of proof at trial. See Pilgrim Ins. Co. v. Molard, 73 Mass. App. Ct. 326, 331 (2008). Where this case turns on an interpretation of the policy, which is a question of law, our review is de novo. See Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 634 (2013).

The policy covers "direct physical loss caused by a covered peril to property of others that you store at your warehouse"

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entirely on the terms of the policy issued for 220 Kenneth Welch Drive.

Whitecap further argues that many of its claims do not turn on whether CSS III's liability would have been covered under an insurance policy. Where, however, Whitecap has not articulated any harm other than the fact that CSS III's liability was not covered under the policy, we disagree.

(quotations omitted). While the policy is an "all risks" policy, and thus all perils are covered unless excluded, a signification exclusion for purposes of this case is an exclusion for the "loss to perishable stock caused by spoilage" (quotations omitted).[3] The parties do not dispute that the temperature fluctuation damage to Whitecap's unbroken crabs falls within the policy's definition of "spoilage." Whitecap instead argues that CSS III's liability would have been covered under three different sections of the policy: (1) an exception to the spoilage exclusion, (2) a supplemental coverage for cold storage,[4] and (3) a coverage extension for "property while it is

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[3] "Spoilage -- We do not cover loss to perishable stock caused by spoilage. But if spoilage results in a specified peril, we do cover the loss or damage caused by that specified peril" (quotations omitted). "'Spoilage' means any detrimental change in physical state of perishable stock. Detrimental change includes, but is not limited to, thawing of frozen goods, warming of refrigerated goods, or solidification of liquid material" (quotation omitted).

[4] "1. Coverage -- We cover direct physical loss resulting from spoilage to perishable stock of others that you store at your warehouse.

"2. Coverage limitation -- We only cover loss resulting from spoilage when the spoilage is caused by:

> "a. a sudden or accidental breakdown or malfunction of refrigeration equipment at your warehouse;
>
> "b. an error in maintaining the temperature of the cold storage area in your warehouse; or
>
> "c. the incorrect usage of the refrigeration equipment in your warehouse." (Quotations omitted).

being moved . . . to prevent a loss caused by a covered peril."[5] While we agree with the Superior Court judge that CSS III's liability would not have been covered under the first two of these provisions, there are genuine issues of material fact as to whether CSS III's liability would have been covered under the third. We address each provision in turn.

a. Exception to spoilage exclusion. The exception to the spoilage exclusion provides that "if spoilage results in a specified peril, we do cover the loss or damage caused by that specified peril" (quotations omitted). See note 3, supra, for complete text of spoilage exclusion. The parties dispute how we should interpret the phrase "results in." Eastern Insurance argues that we should interpret the phrase "results in" according to its plain and ordinary meaning of "causes," while Whitecap argues that we should interpret it to mean "results from." Whitecap contends that interpreting the phrase "results in" to mean "causes" renders the exception to the spoilage

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[5] "Emergency Removal –

> "a. Coverage -- We cover any direct physical loss to covered property while it is being moved or being stored to prevent a loss caused by a covered peril [quotation omitted].
>
> "b. Time Limitation -- This coverage applies for up to 365 days after the property is first moved. Also, this coverage does not extend past the date on which this policy expires."

exclusion meaningless because spoilage could never cause many of the specified perils, as they are defined in the policy.

> "'Specified perils' means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; fighting; riot; sinkhole collapse; smoke; sonic boom; vandalism; vehicles; volcanic action; water damage; weight of ice, snow, or sleet; and windstorm" (quotations omitted).

Although spoilage could and has caused many of the specified perils,[6] Whitecap notes that spoilage could never result in others, such as an aircraft, hail, or a windstorm. It follows, in Whitecap's view, that the phrase "results in" must be read to mean "results from."

Although Whitecap's argument has some appeal if looking at the definition of "specified perils" only as it pertains to the spoilage exception, our obligation is to read the policy as a whole. See Massachusetts Insurers Insolvency Fund v. Safety Ins. Co., 439 Mass. 309, 313 (2003). When we do so, we see that the "specified perils" definition is given full effect elsewhere in the policy. A pollutants exclusion, in particular, provides "[w]e do not pay for loss caused by or resulting from release, discharge, seepage, migration, dispersal, or escape of

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[6] Certainly, spoiled canned food has been known to explode. See, e.g., Palmigiano v. Garrahy, 639 F. Supp. 244, 251 n.6 (D.R.I. 1986); Perry v. Vaught, 624 P.2d 776, 781 (Wyo. 1981). Nor is it implausible that a warehouse full of rancid, rotting food could cause water damage, a civil commotion, fighting, or a riot.

'pollutants' . . . unless caused by a 'specified peril'"[7] (quotation omitted; emphasis added). In the context of the pollutants exclusion, the portions of the definition of "specified perils" to which Whitecap points as nonsensical make perfect sense. Accordingly, where neither the exception to the spoilage exclusion nor the definition of "specified perils" are rendered meaningless by interpreting the phrase "results in" according to its plain and ordinary meaning of "causes," we see no reason to ascribe a wholly different meaning to that phrase. See, e.g., Golchin v. Liberty Mut. Ins. Co., 466 Mass. 156, 159-163 (2013) (interpreting words in insurance policy according to their plain meaning).

Because "results in" means "causes" and because the temperature fluctuation damage to Whitecap's unbroken crab did not cause a specified peril, Whitecap would have been unable to establish at trial that there would have been liability coverage through the exception to the spoilage exclusion.

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[7] We note that -- in marked contrast to the spoilage exception -- the exception to the pollutants exclusion uses the phrase "caused by." See, e.g., Acushnet Co. v. Beam, Inc., 92 Mass. App. Ct. 687, 695-696 (2018) (parties would have used same phrase used elsewhere in contract "had they intended to impose the same meaning"). This is the language that Whitecap wishes were in the exception to the spoilage exclusion. But we give the different language its plain (and differing) meanings. See, e.g., id.

b. Supplemental coverage for cold storage. We next address the endorsement providing supplemental cold storage coverage, the text of which can be found in note 4, supra. The endorsement provides coverage for spoilage under limited circumstances, including where the spoilage "is caused by . . . a sudden or accidental breakdown or malfunction of refrigeration equipment" or by "the incorrect usage of the refrigeration equipment" (quotations omitted).[8] Neither of these, however, was the immediate cause of the damage to Whitecap's unbroken crab. That damage was instead caused by the decision to leave the crab in the loading area for five to six hours at a time. As Cuff testified in his deposition, Whitecap's crab needed to be maintained at minus eighteen degrees Celsius. The only time that any of Whitecap's crab was held above the recommended temperature was when it was in the loading area. Whitecap's broken crab, which was in the loading area for twenty to thirty minutes at a time, did not suffer temperature fluctuation damage, while its unbroken crab, which was in the loading area for five to six hours at a time, did.[9]

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[8] We note the use of the phrase "is caused by," as opposed to the phrase "arising out of," which is read more expansively. See United Nat'l Ins. Co. v. Parish, 48 Mass. App. Ct. 67, 70 (1999).

[9] Whitecap's own complaint alleges that, during the inventorying process, CSS III's employees subjected its unbroken

Nonetheless, Whitecap attempts to tie the damage instead to the fact that the CSS III personnel tried to cool the loading area by keeping the door to the freezer open, which Whitecap asserts was an incorrect usage of the refrigeration equipment falling within the cold storage supplemental coverage. This argument appears to be based on the chain of causation analysis found in Jussim v. Massachusetts Bay Ins. Co., 415 Mass. 24, 27 (1993). Under the chain of causation analysis, if the efficient proximate "cause is an insured risk, there will be coverage even though the final form of the property damage, produced by a series of related events, appears to take the loss outside of the terms of the policy." Id. The "efficient [proximate] cause [is the cause] that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source" (citation omitted). Id. However, as we have previously stated, "[t]he underpinning of Jussim and its application of [the] 'chain of causation' analysis is usually confined to first-party [policy coverages] . . . and not to third-party policy [liability] coverages." Massachusetts Prop. Ins. Underwriting Ass'n v. Berry, 80 Mass. App. Ct. 598, 604 (2011).

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crab "to ambient temperatures for a number of hours causing [their] degradation and loss."

Moreover, even if we were to apply the chain of causation analysis, we would not reach a different conclusion. The cases applying the chain of causation analysis distinguish between "an excluded event which causes a loss . . . and a covered event which causes a loss in the form of an excluded event." Bettigole v. American Employers Ins. Co., 30 Mass. App. Ct. 272, 276 (1991). An insured may recover under a policy only in the event of the latter. See, e.g., Jussim, 415 Mass. at 25-26 (pollutants exclusion did not apply where covered event of negligence caused oil spill without any intervening forces); Standard Elec. Supply Co. v. Norfolk & Dedham Mut. Fire Ins. Co., 1 Mass. App. Ct. 762, 763 (1973) (even though water from covered event of burst pipe seeped underground before causing water damage, underground water exclusion did not apply).

Here, unlike in Jussim and Standard Elec. Supply Co., a covered event did not cause a loss in the form of an excluded event. As to the damage to the freezer, the summary judgment record is clear that CSS III was able to maintain an adequate temperature in the freezer after the forklift accident and that Whitecap's unbroken crab did not spoil in the freezer. Nor did the use of the refrigeration equipment to cool the loading area cause any spoilage. The summary judgment record is again clear that this use sufficiently cooled the loading area such that Whitecap was able to inventory its broken crab without incident.

Where neither the damage to the freezer nor the use of the refrigeration equipment to cool the loading area caused any spoilage in the absence of a decision to leave the unbroken crab in the loading area for five to six hours at a time, that decision (rather than keeping the door open) was an intervening force and the efficient proximate cause of the temperature fluctuation damage. Whitecap, therefore, would have been unable to establish at trial that there was liability coverage through the supplemental coverage for cold storage.

c. Emergency removal coverage extension. That brings us to the coverage extension for "property while it is being moved . . . to prevent a loss caused by a covered peril." See note 5, supra, for complete text of coverage extension. The policy provides that the coverage extension "applies for up to 365 days after the property is first moved," but a schedule of coverages modifies the 365-day limit to ten days. The coverage extension covers "any direct physical loss to covered property while it is being moved . . . to prevent a loss caused by a covered peril" (emphasis added). The use of the word "any" means that the types of "direct physical loss" are not limited; in particular, they are not limited to loss caused by covered perils (which would have incorporated the spoilage exclusion).[10] In this

[10] By contrast, the policy (as opposed to the coverage extension) covers only "direct physical loss caused by a covered

connection, we reiterate that this was an "all risks" policy and, hence, all perils were covered unless excluded.

Whitecap argues that there are genuine issues of material fact as to whether the unbroken crab was moved to prevent a loss caused by additional freezer racks collapsing and whether the loss occurred within ten days of the crab being moved. We agree that these are triable fact issues. See Boazova, 462 Mass. at 350. While Eastern Insurance asserts that no emergency required moving the crab, there is a genuine issue of material fact given Parenteau's affidavit to the contrary and the extensive damage to the racks in the freezer.

As to the ten-day limitation, Eastern Insurance argues that the damage had to occur within ten days of the forklift accident. However, the coverage extension unambiguously applies for up to ten days "after the property is first moved." Where the record does not provide a clear answer as to when exactly the product was moved, and where Eastern Insurance had the burden of showing the absence of triable issues, summary judgment should not have been entered on this basis.

Judgment vacated.

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peril to property of others that you store at your warehouse" (emphasis added). Covered perils are then described as all perils that are not excluded. We attach meaning to the difference in language between the policy and the coverage extension. See, e.g., Acushnet Co. v. Beam, Inc., 92 Mass. App. Ct. 687, 695-696 (2018).

RUBIN, J., (concurring in part and dissenting in part). I agree that there is at least a genuine issue of material fact with respect to whether the provision of the insurance policy issued for the warehouse at 220 Kenneth Welch Drive covering loss during emergency removal, i.e., direct loss to covered property while it is being moved to prevent a loss caused by a covered peril, would have covered the loss that occurred at the warehouse at 234 Kenneth Welch Drive, had an identical policy been issued for it. In fact, it appears undisputed to me that the unbroken crab was first moved less than ten days before it was damaged. I write separately, however, because I also conclude that there is at least a genuine issue of material fact about the applicability of the provision concerning damage caused by "the incorrect usage of the refrigeration equipment" to the circumstances here.

When the pallets of broken crab were inventoried under the oversight of Whitecap's director of quality control, the doors to the refrigerated cold storage area of the warehouse that led to a loading dock within the warehouse were left open to allow the refrigeration equipment to cool the loading area on which the crab was evaluated and from which it was loaded into refrigerated trucks. Whitecap evaluated each pallet in the loading area under these conditions for approximately twenty to thirty minutes. This use of the refrigeration equipment

"sufficiently cooled the loading area such that Whitecap was able to inventory its broken crab without incident." Ante at .

Cold Storage Solutions III, Inc. (CSS III), however, decided to utilize the refrigeration equipment to cool the loading area while inventorying the unbroken crab there over a longer period of time, five to six hours. Viewing the evidence in the light most favorable to the nonmoving party, the refrigeration equipment that cooled the frozen goods in the loading dock area sufficiently for thirty minutes to prevent thawing and damage to the broken crab, was unable to cool the same area adequately to prevent such damage to the unbroken crab inventoried there over that longer period of time. There is thus, at least, a genuine issue of material fact with respect to whether the attempt to refrigerate the loading area for the five to six hours it took to complete the inventory was an "incorrect usage of the refrigeration equipment" by CSS III's employees that proximately caused the damage to the frozen crab.

The majority's contrary conclusion, that the misuse of the refrigeration equipment to attempt to cool the loading area during the five to six hour inventory was not a proximate cause of the damage -- or indeed a cause of the damage at all -- rests on its assertion that the misuse of the refrigeration was not the cause because the damage was "caused by the decision to

leave the crab in the loading area for five to six hours at a time." Ante at . But that decision cannot be separated from the decision to misuse the refrigeration equipment to try to cool that area. After all, it is not as though the CSS III employees placed the frozen crab in the sun. It is a reasonable inference that they chose the loading area precisely because they thought, incorrectly it turns out, that the refrigeration equipment could cool that area through the open doors of the refrigerated warehouse adequately to protect the goods during the time it took to inventory them.

Finally, I also agree with the plain language reading of the exception to the spoilage exclusion given by the majority, although I think it is a closer case than the majority intimates. The plain language of that provision states that it applies "if spoilage results in a specified peril" (quotations omitted). It seems exceedingly unlikely that this is what the parties meant. Specified perils is defined to mean "aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; fighting; riot; sinkhole collapse; smoke; sonic boom; vandalism; vehicles; volcanic action; water damage; weight of ice, snow or sleet; and wind storm." The nature of these perils suggests that this is not a list of things that might result from spoilage, but a list of things that might result in spoilage. I am not persuaded by the

fanciful suggestion of the majority that "a warehouse full of rancid, rotting food could cause . . . a civil commotion, fighting, or a riot," ante at note 6, events that, as far as I am aware, have never been caused by spoilage at any cold storage warehouse, anywhere in the United States, ever.

Nonetheless, it is true, as the majority also notes, that spoilage could cause an explosion or water damage, two of the listed perils, notwithstanding the substantial unlikelihood of either of those consequences. In the absence of some better indication that this is really a scrivener's error in the wording of the policy – for example, the introduction in evidence of other similar policies providing coverage where spoilage is caused by such perils – I do feel constrained to read the plain language, as the majority does, not to provide coverage in these circumstances. This is because, in light of the possibility of an explosion or water damage, as written the provision is not completely meaningless or absurd, and all its terms can be given meaning if it is read literally in this way.

For these reasons, I concur in part, dissent in part, and concur in the judgment.